

# Washington International Law Journal

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Volume 4  
Number 3 *Securities Regulation in the APEC  
Countries*

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7-1-1995

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Misao Tatsuta

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### Recommended Citation

Misao Tatsuta, *Insider Trading by an Issuer under Japanese Law*, 4 Pac. Rim L & Pol'y J. 633 (1995).  
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## INSIDER TRADING BY AN ISSUER UNDER JAPANESE LAW

Misao Tatsuta<sup>†</sup>

**Abstract:** This Article explores the impact of the 1994 amendments to the Commercial Code on the Japanese Securities and Exchange Law, especially as they pertain to insider trading by stock issuers. The Article identifies limited situations, both in tender offer and public stock market contexts, in which companies may purchase their own stocks. Specifically, the Article addresses the issuer's repurchase plan, the necessary elements of disclosure, and the penalties for non-disclosure. The Article analyzes the amendments and questions their effectiveness in addressing the problem of insider trading.

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- I. INTRODUCTION

Japan owes its disclosure philosophy to William E. Gladstone, via Franklin D. Roosevelt.<sup>1</sup> The writer is not sure whether Gladstone was cog-

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<sup>†</sup> Professor of Law, Kyoto University, Kyoto, Japan; LL.M. (University of California, Berkeley); LL.B. (Hōgakushi), (Kyoto University).

<sup>1</sup> Gladstone is the father of modern English company law. The Joint Stock Companies Act of 1844, which included disclosure requirements to cope with securities fraud, was drafted while he was President of the Board of Trade. L.C.B. GOWER, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 38-40 (5th ed. 1992). U.S. federal securities laws, pushed forward by Franklin D. Roosevelt, were modeled after the U.K. Companies Act with respect to disclosure philosophy. 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 180 (3d ed. 1989). Japan copied main provisions of the Securities Act of 1933 and the

nizant of insider trading, whereas Roosevelt certainly must have known it since he signed the Securities Exchange Act of 1934 which contained section 16.

The phrase "disclose or abstain" is symbolic insofar as it indicates that insider trading is one of the most important issues related to disclosure. There is no room for insider trading to take place where all material information is completely disclosed. In reality, however, most corporations cannot help but keep some material information confidential. In this sense, full disclosure cannot be tantamount to complete disclosure. Thus, human weakness, or brazen face, may give rise to insider trading.

Japan was a latecomer to regulating insider trading. On the other hand, Japan was among the first to strictly prohibit a company from purchasing its own shares. In 1988, Japan first introduced clear provisions to ban insider trading.<sup>2</sup> In 1992, it strengthened its enforcement vehicle.<sup>3</sup> Then, in 1994, Japan loosened its restriction on the repurchase of a company's own shares.<sup>4</sup> An issuer is an utmost insider. The 1994 lift of the ban, though partial, increased opportunities for insider trading by issuers. This Article sketches out what a combination of these factors looks like.

Part II briefly describes legislative history of Japanese insider trading regulation that culminated in the monster-like set of provisions in 1988. It also relates background of the 1992 amendments which brought forth the Securities Surveillance Commission. Part III then explains statutory provisions on repurchase by a company of its own shares, before and after the 1994 amendments. Part IV examines stipulations specific to an issuer's insider trading from the viewpoint of investor protection.

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Securities Exchange Act of 1934 of the United States when it enacted the Shōken Torihikihō [Securities and Exchange Law], Law No. 25 of 1948 [hereinafter SEL]. MISAO TATSUTA, SECURITIES REGULATION IN JAPAN 10 (1970).

<sup>2</sup> Shōken Torihiki Hō no Ichibu o Kaisei suru Hōritsu [Amendment of the SEL], Law No. 75 of 1988.

<sup>3</sup> Shōken Torihiki no Kōsei o Kakuho suru tame no Shōken Torihiki Hō tō no Ichibu o Kaisei suru Hōritsu [Amendment of the SEL to Secure Fairness in Securities Exchanges], Law No. 73 of 1992.

<sup>4</sup> Shōken Torihiki Hō no Ichibu o Kaisei suru Hōritsu [Amendment of the SEL], Law No. 70 of 1994.

## II. INSIDER TRADING AND ITS CRIMINALIZATION

### A. *The Dark Ages*

The original version of the Securities and Exchange Law of 1948, transplanted the general anti-fraud provision<sup>5</sup> from U.S. Rule 10b-5,<sup>6</sup> the reporting requirement as to changes in shareholding by directors, supervisors, and ten percent shareholders<sup>7</sup> from section 16(a) of the United States Securities Exchange Act of 1934,<sup>8</sup> and a provision to have these insiders disgorge short swing profits<sup>9</sup> from section 16(b) of the same Act.<sup>10</sup>

The reporting requirement, however, was repealed five years later in 1953.<sup>11</sup> Both the general anti-fraud provision and the short-swing profit provision have been almost dormant for more than forty years.<sup>12</sup>

Later amendments introduced a prohibition on directors and employees of securities companies (broker-dealers) from trading securities by making use of special information obtained by virtue of their position, such as the trend of customers' orders.<sup>13</sup> The Ministry of Finance, which is in charge of administering the Securities and Exchange Law, issued a release warning insiders to refrain from engaging in illegal trading. But, unlike other releases, this was not made open to the public for some unknown reason.<sup>14</sup> From time to time, it was reported that stock exchanges made inquiries and warnings as to suspected insider trading. These were not publicized either.

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<sup>5</sup> SEL art. 58 (1948); SEL art. 157 (1994).

<sup>6</sup> 17 C.F.R. § 240.10b-5 (1994).

<sup>7</sup> SEL art. 188 (1948). SEL art. 163 (1994) is linked with the Finance Minister's warning measure stipulated in art. 164. See *supra* note 6.

<sup>8</sup> 15 U.S.C. § 78p(a) (1988).

<sup>9</sup> SEL art. 189 (1948). SEL art. 164 (1994) is much improved. Where the Minister of Finance suspects from the filed report that any of the insiders has not paid to the corporation the amount of the short-swing profits, the Minister shall send to the insider a statement of such profits, and upon suspecting that the insider has not complied, the Minister shall make the statement open for public inspection.

<sup>10</sup> 15 U.S.C. § 78p(a) (1988).

<sup>11</sup> Misao Tatsuta, *Enforcement of Japanese Securities Legislation*, 1 J. COMP. CORP. L. & SEC. REG. 95, 112 (1978) [hereinafter Tatsuta, *Enforcement*].

<sup>12</sup> *Id.* at 107.

<sup>13</sup> Shokengaisha no kenzensei no junsoku tou ni kansuru shorei [Ministerial Rule Concerning Standards of Soundness for Securities Companies], Ministry of Finance Rule No. 60 of 1965, art. 1, Item 5 (now art. 2, Item 5).

<sup>14</sup> Tatsuta, *Enforcement*, *supra* note 11, at 133, n. 142.

Scholars were of the opinion that insider trading was violative of the general anti-fraud provision, and that civil liabilities as well as administrative and penal sanctions would ensue.<sup>15</sup> However, the government took a rather negative view. A report of the Securities Council, submitted to the Minister of Finance in 1976, denied applicability of the general anti-fraud provision to insider trading on the ground that it was too broad and ambiguous.<sup>16</sup>

In 1987, two questionable cases made headlines in mass media. One case was related to the insolvency of a medium-size chemical company listed on the Osaka Stock Exchange: one of the lead banks sold out its holding on the verge. The stock exchange investigated, but finally announced that it could not get evidence of an insider trading.<sup>17</sup>

The other case involved a business merger between Shin Nippon Steel, the top steel manufacturer, and a medium-sized bearing manufacturer. Upon announcement of the tie-up, the latter's stock price rose. Before then, some Shin Nippon employees, who had been engaged in the negotiation, had purchased shares in the latter. According to the employees, the motive was not to gain profits, but to become intimate with their employer's prospective partner. They did not know that insider trading was illegal. The shares purchased were not large in amount. No legal step was taken against them.<sup>18</sup>

#### *B. Dawn*

People were angry about these cases and public confidence in the stock market was at bay. The Ministry of Finance hurried to build up a quadripartite scheme to cope with insider trading. Emphasis was placed on: (1) prevention, (2) reporting requirements, (3) impetus to disgorge short-swung profits, and (4) penalties for certain types of insider trading.

The 1988 amendments to the Securities and Exchange Law, after the examples of British and French legislation, placed emphasis on the penalty

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<sup>15</sup> *Id.* at 133, n. 137.

<sup>16</sup> *Id.* at 112.

<sup>17</sup> ASAHI SHINBUN, Oct. 6, 1987, at 1.

<sup>18</sup> ASAHI SHINBUN, Aug. 27, 1988, at 1.

aspect, though it is not heavy.<sup>19</sup> Insiders and inside information are defined in detail.<sup>20</sup> The method of publicizing, which is relevant to draw the line between legal and illegal trading, is also precisely defined. As a result, a tremendous body of insider trading statutes emerged, embracing not only provisions of the Securities and Exchange Law but also those of cabinet rules and Ministry of Finance rules.<sup>21</sup> They took full effect on April 1, 1989.

Punishable insider trading is classified into two categories in terms of the nature of inside information. One relates to business information of the issuer, such as discovery of a rich ore mine, prospective increase in dividends, serious litigation, insolvency, and so on.<sup>22</sup> The other category relates to takeovers. Once a company has decided to launch a tender offer, an insider, director, employee, or some other affiliate, may not buy shares in the target company until it is publicized. Or an insider may not sell shares in the target company, once a company has decided to discontinue an already publicized tender offer scheme until the discontinuance is publicized. An insider is subject to the same restriction when a company has decided to purchase shares in another company amounting to five percent or more of the aggregate outstanding shares.<sup>23</sup>

This emphasis on "tender-offer-related insider trading" sounds rather strange. It is true that the Securities and Exchange Law and rules thereunder have detailed provisions on tender offer. But during the period of almost twenty years between 1971, when the said provisions were intro-

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<sup>19</sup> The maximum penalty is imprisonment with forced labor for six months, a fine of ¥500,000, or both. SEL art. 200, Item 6 (1988). A much heavier penalty is now imposed on one type of the crime. See *infra* note 42.

<sup>20</sup> As for the definition of insiders, see *infra* note 37. Conveyance of inside information and trading by tippees are not inclusively regulated. The statute only prohibits one who has been notified of material facts by one of the defined insiders from trading in the stock before such facts are publicized. SEL art. 166, para. 3; art. 167, para. 4 (1988). Thus, a tippee's tippee is free to trade, unless the first tippee is regarded as a mere conduit.

<sup>21</sup> English version of statutory provisions as of the promulgation can be found in KAZUMI OKAMURA & CHIEKO TAKESHITA, LAWS AND REGULATIONS RELATING TO INSIDER TRADING IN JAPAN (Compiled by the Secondary Market Division of the Securities Bureau, Ministry of Finance, 1989, Commercial Law Center, Inc., Tokyo).

<sup>22</sup> SEL art. 166, para. 2 (1992) enumerates four types of material facts: (1) certain matters that have been decided upon by a corporate organ; (2) certain matters that have taken place; (3) certain changes in publicly announced estimate figures; and (4) a catch-all clause. The above (1) is subdivided into eight (then seven) items and the cabinet rule adds nine items thereto. The above (2) is subdivided into four items and the cabinet rule adds eleven items. Thus, on a simple calculation, thirty-three items are designated as material facts.

<sup>23</sup> SEL art. 167 (1994).

duced, and 1990, when they were revised so as to make them neutral and to render certain tender offers compulsory,<sup>24</sup> only two tender offers took place in Japan. Both of them were friendly, and it is doubtful that a tender offer was the best device in those two cases.<sup>25</sup> Although there were some hot proxy contests in the 1950s, those raiders were generally regarded as somewhat asocial. The better method, according to the general view, is to conduct a merger or to tie-up amicably, either upon request from the target or with the help of some senior intermediary. It will be much easier to operate a business after a merger of this type, rather than after taking over against the will of the target.

### III. PURCHASE BY A COMPANY OF ITS OWN SHARES

#### A. *Before 1994*

The Commercial Code of Japan, when it was enacted in 1899, strictly prohibited a corporation from acquiring its own shares.<sup>26</sup> The 1938 amendment of the Code introduced three exceptions for the reacquisition of shares: (1) for the purpose of their retirement; (2) as a result of corporate merger or acquisition of another business by transfer; and (3) when necessary for exercise of the corporation's rights, i.e., in satisfaction of a debt.<sup>27</sup> By virtue of the 1950 amendments, which copied several features of U.S. corporations law including appraisal remedy for dissident shareholders, the fourth exception was added so as to allow a corporation to acquire its own

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<sup>24</sup> Before the 1990 amendments, a tender offeror had to notify the target company of the project ten days in advance. SEL then art. 27-2 (1972). According to the present statute, you must resort to the device of tender offer whenever you plan to purchase shares from more than 10 persons which will result in your holding more than five percent of the outstanding shares in the target company, or whenever you plan to purchase shares which will result in your holding more than 30% of the outstanding shares, unless the purchase is made in the open market. SEL art. 27-2, para. 1 (1994).

<sup>25</sup> One of them was made in 1972 by Bendix Corp. in order to integrate a Japanese affiliate into consolidated accounting. The other took place in the same year as a device to consolidate three power companies that had been separately operating during the Okinawa occupation. After the effectiveness of the 1990 amendments, a few compulsory tender offers were made so as to transfer controlling shares. No shareholder other than the controlling shareholders tendered his shares, perhaps because the price was unattractive.

<sup>26</sup> SHŌHŌ [Commercial Code], Law No. 48 of 1899, art. 151, para. 1 [hereinafter Commercial Code].

<sup>27</sup> Commercial Code art. 210, Items 1-3 (1938).

shares in response to an exercise of appraisal rights by dissenting shareholders.<sup>28</sup>

As the statutory provisions have changed, the way of looking at repurchase of shares has also changed. When repurchase was initially prohibited without any exception, courts and commentators explained that it was logically impossible for a corporation to be a member of itself.<sup>29</sup> However, after the 1938 amendment, the reasoning of theoretical impossibility was inconsistent with the provisions whereby a corporation may repurchase its own shares under certain exceptions. Then, scholars generally regarded the restriction on reacquisition as deriving from policy reasons: maintenance of capital; equality of shareholders; just and fair control; and just and fair stock transactions.<sup>30</sup> This change of view released policy arguments to the extent of prohibiting corporate repurchase. After World War II, business circles repeated their request to ease the restriction.

Another turning point was the 1948 amendment. Before then, payments for stock were made by installment. A repurchase by the corporation of its shares which were not fully paid was tantamount to excusing the selling shareholder from his duty to pay. The 1948 amendment replaced the installment payment with full payment at the time of stock issue. Maintenance of capital, the strongest policy reason for restricting repurchase, lost a part of its weight, because all of the issued shares were fully paid. This change somehow gave strength to the case for easing the restriction *de lege ferenda*, and to the argument that a violative repurchase should not be con-

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<sup>28</sup> Commercial Code art. 210, Item 4 (1950). Appraisal remedy has been expanded. In six occasions, a corporation can repurchase its own shares. The 1950 version granted a remedy to dissenters on two occasions: (1) where the corporation transfers all or an important part of its business, leases, entrusts management of, or participates in a pool of profit and loss with regard to, all of its business, or acquires whole business of another corporation, Commercial Code art. 245-2 to art. 245-4 (1950); and (2) where the corporation enters into a merger agreement, Commercial Code art. 408-3 (1950). The 1966 revision added another occasion, (3) where the corporate charter is amended so as to restrict transfer of shares. Commercial Code art. 349 (1966). Another occasion was then added by the 1990 amendment, (4) where the corporation transforms itself into a limited liability corporation. *Yugen-gaishahō* [Limited Liability Corporation Law], Law No. 74 of 1938, art. 64-2. Aside from these remedies, (5) a shareholder is entitled to have the corporation purchase his shares that are less in number to form a "unit," as no certificate may be issued for such small number of shares. Supplementary Provisions to the Commercial Code, art. 19 (1981). Lastly, (6) a holder of fractional shares has the same right where the corporate charter provides that no certificate is issued to represent fractional shares. Commercial Code art. 230-8-2 (1990).

<sup>29</sup> Judgment of Sept. 27, 1922 (Japan v. Hanamoto), Saikōsai [Supreme Court], 1 Keishū 483; J. Matsumoto, *Kaisha no jiko kabushiki no shutoku* [Reacquisition by a Corporation of its Shares], 55 HŌGAKU SHIRIN 11 (1904).

<sup>30</sup> Misao Tatsuta, *Patterns of Restricting Share Reacquisitions by Corporations: Jiko kabushiki shutoku no kisei ruikei*, 6 LAW IN JAPAN: AN ANNUAL 128, 133 (1973).



strued to be void. Some argue that a repurchase is not hazardous, so far as it is made within the limit of disposable surplus.

### B. *The 1994 Amendment*

The Legislative Council ignored the repeated request on the part of various business circles to ease the restriction. However, in 1993, it was rather difficult for the Council to keep its stance. The stock market was in severe recession, mainly as a result of economic depression, and was also aggravated by the existence of an excessive volume of shares that had been issued too easily during the earlier boom years. The Tokyo Stock Exchange Price Index ("TOPIX") fell, from its peak above 2,800 in 1989, down below 1,200 in 1992. Trading volume shrunk to a critical level for broker-dealers. New issue of shares was frozen by virtue of administrative guidance. Corporations found it impossible to raise funds by means of equity finance. A trigger for recovery was needed.

The Cabinet formulated a set of emergency policy measures to cope with the recession. Among them was the proposal to ease the restriction on corporate repurchase of shares. This was not persuasive for some scholars. But the scheme was mightily pushed by business circles. They argued that: treasury shares help operate employee stock ownership plans; repurchase of shares enables the issuer to engage in flexible finance schemes; owning stock is the safest means of investment; shareholders will enjoy a higher rate of dividends with a smaller number of outstanding shares; repurchase is necessary for a closely-held corporation to prevent undesirable outsiders from joining it on occasion of a shareholder's death or a need to sell one's shares when the remaining shareholders cannot afford to buy them, and so forth. Business circles pointed out active repurchase by U.S. corporations and enabling state statutes, but they shut their eyes to the safe harbor rules of federal regulation.<sup>31</sup> Many scholars were cautious in easing the restriction,<sup>32</sup> but cries from businesses outweighed in volume the academic sermon.

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<sup>31</sup> Rule 10b-18; 17 C.F.R. § 240.10b-18 (1994).

<sup>32</sup> E.g., Egashira, *Jiko-kabushiki shutoku kisei no kanwa mondai ni tsuite* [On the Problem of Easing the Restriction on a Corporation's Repurchase of Its Own Shares], 1302 SHOJI HOMU 2 (1992); Yoshihara, *Jiko-kabushiki shutoku kisei no kanwa ni kansuru ronten (ichi)* [Issues Relating to Easing the Restriction on a Corporation's Repurchase of Its Own Shares (1)], 107 MINSHOHŌ ZASSHI 325 (1992) and Yoshihara, *Jiko-kabushiki shutoku kisei no kanwa ni kansuru ronten (ni)* [Issues Relating to Easing the Restriction on a Corporation's Repurchase of Its Own Shares (2)], 108 MINSHOHŌ ZASSHI 337 (1993); Iwahara, *Jiko-kabushiki shutoku kisei no minaoshi (jō)* [Reexamination of the Restriction on a Corporation's Repurchase

The Ministry of Justice made an inquiry as to the desirability of easing the restriction, and an overwhelming number of organizations responded in the affirmative. Thus, the statute was amended.

The 1994 amendment added four exceptions. First, a corporation may repurchase its shares for the purpose of transferring them to its employees, on condition that the annual meeting of shareholders authorizes it and that the aggregate number does not exceed three percent of its outstanding shares.<sup>33</sup> Second, a corporation may repurchase its shares for the purpose of their retirement if the annual meeting of shareholders authorizes it.<sup>34</sup> Third, where transfer of shares is restricted by the corporate charter, the

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of Its Own Shares, Vol. 1], 1334 SHOJI HOMU 45 (1993) and Iwahara, *Jiko-kabushiki shutoku kisei no minaoshi (ge)* [Reexamination of the Restriction on a Corporation's Repurchase of Its Own Shares, Vol. 2], 1335 SHOJI HOMU 12 (1993). On the other hand, some scholars are sympathetic to the request of easing the restriction to a certain extent. E.g., Ōtori, *Jiko-kabushiki no shutoku seigen no kanwa ni tsuite* [On Easing the Restriction on a Corporation's Repurchase of Its Own Stock], 485 TOKYO KABUSHIKI KONWAKAI KAIHO 1 (1991); Ōsumi, *Jiko-kabushiki shutoku kisei no kanwa ni tsuite* [On Easing the Restriction on a Corporation's Repurchase of Its Own Shares], 1295 SHOJI HOMU 2 (1992) and *Jiko-kabushiki shutoku kisei no kanwa ni tsuite, Teisei sairon* [On Easing the Restriction on a Corporation's Repurchase of Its Own Shares, revised version] 1309 SHOJI HOMU 36 (1993); Kanda, *Jiko-kabushiki shutoku to kigyō kinyū (jō)* [Repurchase by a Corporation of Its Own Stock and Corporate Finance, Vol. 1], 1291 SHOJI HOMU 2 and Kanda, *Jiko-kabushiki shutoku to kigyō kinyū (ge)* [Repurchase by a Corporation of Its Own Stock and Corporate Finance, Vol. 2] 1292 SHOJI HOMU 7 (1992).

<sup>33</sup> Commercial Code art. 210-2 (1994). The main object of this exception is to help operate employee stock ownership plan. The corporation may also transfer the shares to those employees who have been working for it for longer than certain years. The Code contemplates these cases when it says "for the purpose of transferring the shares to its hired person (*shiyonin*) for just causes." The term "employee" (*jogyoin*) is not found in the Code, and the draftsmen chose the term "hired person" that is already used elsewhere within the Code, though both have the same meaning.

<sup>34</sup> Commercial Code art. 212-2 (1994). Prior to the amendment, a corporation could retire shares only in the course of reducing the stated capital or in accordance with the charter provision. Commercial Code art. 212, para. 1 (1988). According to the majority view, the charter provision authorizing retirement must be found in the original charter or must be inserted by a unanimous consent of the shareholders. This is impracticable.

Another barrier was tax law. Where a corporation retires the shares out of its surplus, the law regards the part of the stated capital corresponding to the number of retired shares as being distributed to the remaining shareholders. Thus, the government levies tax on them as well as on the retiring shareholder who gets capital gain. Shotokuzei-hō [Income Tax Law], Law No. 33 of 1965, art. 25, para. 2, Item 1; Hōjinzei-hō [Corporation Tax Law], Law No. 34 of 1965, art. 24, para. 2, Item 1. While corporation lawyers are opposed to this notion of "constructive dividends," tax lawyers support it. Takeuchi, *Jikokabushiki shutoku kisei no kanwa to shōhō zeihō* [Easing the Restriction on Repurchase by a Corporation of Its Own Shares in the Light of Commercial Law and Tax Law], 1286 SHOJI HOMU 2 (1992). A corporation is exempt from obligation to pay withholding tax for "constructive dividends" when retiring its shares, as a result of tax law amendment in 1994. Sozei tokubetsu sochi-hō [Special Measures Tax Law], Law No. 26 of 1957, art. 9-5. This revision, without repealing the notion of "constructive dividends," has given rise to another problem: how to fix the shareholder obliged to pay the tax when shares are transferred.

corporation may preempt the shares, if a shareholder requests an approval and the proposed transferee is not desirable for the corporation.<sup>35</sup> Fourth, a corporation of the same category may repurchase its shares from heirs of a deceased shareholder within one year of the shareholder's death.<sup>36</sup>

In each of these four cases, a corporation may purchase its own shares only out of its disposable surplus. A publicly-held corporation may purchase only in the public stock markets.<sup>37</sup> A closely-held corporation may repurchase only when authorized by a special resolution of the general meeting of shareholders, and the notice therefore must state that any shareholder is entitled to a request to add him as a seller. This Article does not attempt to explain in detail these and other requirements on repurchase imposed by the Commercial Code.

#### IV. ISSUER AS AN INSIDER

##### A. *Repurchase Plan Is Material Information*

As has been described above, the Securities and Exchange Law defines in detail the persons who are regarded as insiders, the facts that are regarded as material, and the means whereby information is deemed to be publicized. The somehow inflexible framework of this sort derives from the draftsmen's belief that a statutory provision which may cause penal sanction must be framed in an unambiguous way. The better view is that punishment is one thing and prevention or relief is another thing: the latter should be framed in flexible terms.

Before the 1994 amendment to the Commercial Code, repurchase by a corporation of its own shares was really an exception, and the Securities and Exchange Law paid little attention to it. Along with easing the restriction by the Commercial Code, the Securities and Exchange Law also

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<sup>35</sup> Commercial Code art. 204-3-2 (1994). It is necessary that the preemption is authorized by the general meeting of shareholders. The maximum number of shares to be repurchased is twenty percent of outstanding shares, together with those repurchased in accordance with (4) below.

<sup>36</sup> Commercial Code art. 210-3 (1994). It must be authorized by the general meeting of shareholders. And the limit is twenty percent together with the shares repurchased pursuant to (3) above.

<sup>37</sup> The public stock markets include stock exchange markets as well as the over-the-counter market administered by the Japanese Association of Securities Dealers. Commercial Code art. 210-2, para. 8; art. 212-2, para. 4 (1994). A publicly-held corporation may resort to a tender offer, when it purchases its own shares in order to retire them in accordance with the repurchase plan approved by the annual meeting of shareholders. See *infra* note 38.

underwent an amendment to cope with unfair practices relating to an issuer's repurchase.

The 1994 amendment inserted the phrase "acquisition of own shares pursuant to the provision of article 210-2 or article 212-2 of the Commercial Code" into the definitional enumeration of material facts in relation to insider trading.<sup>38</sup> Once the annual meeting of shareholders has approved the repurchase plan, the directors are authorized to repurchase shares in accordance with the approved plan during the period of approximately one year, to wit, until the close of the next annual meeting of shareholders.<sup>39</sup> So long as the issuer has already publicized the repurchase plan, the issuer may purchase shares without publicizing each particular transaction to be carried out.<sup>40</sup>

With regard to the issuer's repurchase, such elements as the date, the amount, and the market are all material facts. They should be disclosed before the directors carry out each transaction, even though the annual plan itself has been publicized. But disclosure of these elements would certainly affect the stock price, and would make it difficult for the issuer to purchase shares pursuant to the plan. Thus, the Securities and Exchange Law only requires disclosure of the repurchase plan, and not of a particular schedule of each trade.<sup>41</sup> Only the issuer itself is exempt from prohibition from trading in the shares without disclosing these particulars. Insiders other than the issuer<sup>42</sup> are prohibited from purchasing the shares until the particu-

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<sup>38</sup> SEL art. 166, para. 2, Item 1(iii) (1994). This is one of the thirty-three material facts defined by the statute. This item covers only two out of the four grounds of repurchasing shares added by the 1994 amendment to the Commercial Code: i.e., (1) transfer to the employees and (2) retirement of shares. The other two grounds, i.e., (3) refusal of the proposed transferee of restricted shares and (4) occasion of succession of such shares, are related to closely-held corporations and irrelevant to the stock markets.

<sup>39</sup> Commercial Code art. 210-2, para. 4; art. 212-2, para. 4 (1994).

<sup>40</sup> SEL art. 166, para. 5, Item 4-2 (1994). It is the repurchase plan that must be publicized. The repurchase plan ought to be authorized by the annual meeting of shareholders. Thus, the issuer may publicize the fact that the annual meeting has authorized the repurchase plan. However, even before then the issuer may publicize the fact that the board of directors, or the executive committee as the case may be, has decided to propose the repurchase plan to the annual meeting of shareholders. If the annual meeting authorizes the proposal without any modification, the public announcement of the proposal suffices to dispense with the need for further publication of each repurchase to be carried out.

<sup>41</sup> Special Subcommittee on Fair Trading, Securities Council, *Shokentorihiki Shingikai Koseitorihiki Tokubetsu-bukai, Jiko-kabushiki shutoku tou no kisei kanwa ni tomonau shokentorihiki seido no seibi ni tsuite* [On Establishing Necessary Means under the Securities and Exchange Law in Connection with Easing Restriction on Repurchase by an Issuer of Its Own Shares], III 1 (3) 3 (Feb. 7, 1994), reprinted in 1346 SHOJI HOMU 24 (1994).

<sup>42</sup> The fact is that an issuer is not one of the enumerated insiders within the statutory definition. The defined insiders are as follows: (1) the directors, agents and employees of the issuer; (2) 3% shareholders

lar schedule of repurchase is publicized—even after the annual repurchase plan has been already publicized—so long as they are aware of the particular schedule such as the date, the amount, and the market because of their respective position. Thus, it is true that the exemption does not mean an entire lift of the ban. But it is quite regrettable and ironic that a particular schedule of each trade is not required to be disclosed on the very ground that it is price sensitive.

*B. Trading by An Issuer When It Has Material Information*

Another response on the part of the Securities and Exchange Law to ease the restriction on repurchase by the 1994 amendment to the Commercial Code was the enactment of new provisions on tender offers by an issuer. A publicly-held corporation may, instead of purchasing its shares in the public stock markets, resort to a tender offer, when it purchases its own shares out of surplus in order to retire them in accordance with the repurchase plan approved by the annual meeting of shareholders.<sup>43</sup> Statutory requirements for an issuer's tender offer are similar to those stipulated for a tender offer initiated by a raider: public announcement in newspapers, delivery of a tender offer prospectus, abstention from purchasing the shares

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who are entitled to inspecting books and records of the issuer (before the 1990 amendment only 10% shareholders were entitled to inspection. Commercial Code art. 293-6); (3) persons who have statutory power over the issuer, such as members of a regulatory body; (4) parties to a contract with the issuer, such as a bank, an underwriter, and the prospective constituents of a merger with the issuer; and (5) the directors, agents and employees of the foregoing, where they are a juridical person. SEL art. 166, para. 1 (1994). Similar definition of insiders is found in SEL art. 167, para. 1 (1994) with respect to trading in connection with take-overs. Since it was virtually impossible for an issuer to purchase its own shares prior to the 1994 amendment to the Commercial Code, the omission of an issuer from the definition of insiders was not astonishing. An intelligible way of legislation would have been to add an issuer to the definition on occasion of easing the restriction on an issuer's repurchase, so long as the statute adheres to the enumerative definition which is by no means an advisable policy. See *supra* note 17 as to the treatment of tippees. The draftsmen seem to expect that a director is barred to purchase shares on behalf of the issuer as well before material facts are publicized, and that this prohibition covers an issuer's insider trading.

<sup>43</sup> Commercial Code art. 212-2, para. 4 (1994). The ceiling is 10% of the aggregate outstanding shares as to the issuer's repurchase out of surplus for the purpose of retiring the shares. Thus, it may happen for an issuer to purchase a substantial amount of shares in a short period for this purpose. Whereas the ceiling is only 3% as to repurchase for the purpose of supporting an employee stock ownership plan, and the 1994 amendment did not make a tender offer available for this purpose. Commercial Code art. 210-2, paras. 1, 3, 8 (1994).

otherwise than the tender offer during its period, pro rata purchase on occasion of over tender and so forth.<sup>44</sup>

Apart from the common requirements on both tender offers, by an issuer and by others, one provision is noteworthy in connection with insider trading. An issuer planning to initiate a tender offer must publicize such material facts, if any, as defined by the statute prior to the date on which it files the tender offer statement with the Minister of Finance.<sup>45</sup> During the tender offer period, the issuer-offeror must publicize the same upon occurrence of such event or upon knowing that there exists a material fact which has not been publicized: the issuer-offeror must also notify the shareholders who have tendered or are to tender the shares of such material fact.

Noncompliance with this obligation will entail civil and penal sanctions upon the issuer, its directors, and supervisors. On the civil side, they are jointly and severally liable for damages as to the loss suffered by the seller-shareholders due to the failure of disclosure or misstatement.<sup>46</sup> The penalty is the heaviest one among the crimes stipulated by the Securities and Exchange Law.<sup>47</sup>

In contrast to the strict stance against non-disclosure in case of a tender offer, the statute does not provide for equivalent sanctions as to the issuer's purchase in the public markets without disclosing material facts. The directors, agents, and employees of the issuer must abstain from trading the stock in the issuer, on behalf of the issuer, as well as for themselves when they are aware of any of the enumerated material facts and the fact has not been publicized.<sup>48</sup> But, it is these individuals themselves who violate the explicit provision when buying shares on behalf of the issuer without

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<sup>44</sup> SEL art. 27-22-2, para. 2 (1994). This article is a provision of formidable style, listing up a number of provisions on tender offer by a person other than the issuer which are applicable *mutatis mutandis* to a tender offer by the issuer, with numerous substitutions of terms. It symbolizes the draftsmen's lack of attitude to make the Securities and Exchange Law to be shared with the public at large.

<sup>45</sup> SEL art. 27-22-3, para. 1 (1994). In order to fall within the definition of "to have been publicized," it is necessary for twelve hours to elapse after revealing the fact to media of communication including at least two of such qualified media as daily press of general or financial news, news agencies, or broadcasting firms. SEL art. 27-22-3, para. 3 (1994); SEL Enforcement Rule art. 14-3-11 (1994).

<sup>46</sup> SEL art. 27-22-3, para. 2 (1994). A seller who knew the fact is not entitled to the remedy. A defendant is not liable if he proves that he did not know the existence of the unpublicized material fact notwithstanding his devoting reasonable care.

<sup>47</sup> For the individual offenders, an imprisonment with forced labor up to three years, a fine up to ¥3 million, or both. SEL art. 197, Item 3-2 (1994). For the issuer corporation, a fine up to ¥300 million. SEL art. 207, para. 1, Item 1 (1994). Compare these penalties with the case of ordinary insider trading, *supra* note 16.

<sup>48</sup> *Supra* note 37.

publicizing the material fact. They will be subject to the penal sanction.<sup>49</sup> Also, it may be possible for the issuer corporation to be subject to a penalty, but it is the same as is imposed on the individuals who actually purchased the shares, i.e., a fine up to ¥500,000.<sup>50</sup>

The scope of applicability of the aforementioned provision on civil liability is expressly confined to the situation where the issuer-offeror fails to publicize a material fact in connection with a tender offer. There is no statutory provision that renders a person liable for damages as to insider trading in general. In theory, it may be possible to resort to the general anti-fraud provision<sup>51</sup> and to regard its violation as meeting the requirement of illegality stipulated by the general tort provision which is a statutory basis for damages.<sup>52</sup>

Where insider trading is committed in the public stock markets, there may be a number of victim-sellers and a number of buyers other than the insider, the issuer in the present discussion. It would not make sense to sort out some of those victims whose sell orders match with buy orders of the issuer. A possible solution may be to have the issuer pay the balance between the stock price after revelation of the material fact and the purchase price, then to distribute the amount pro rata among the sellers at the time of the issuer's purchase. This remedy would result in selecting the victims by chance and satisfy them only in part, but it would have an effect at least to deter insider trading by an issuer, without subjecting it to damages of astronomical figures.

When it comes to a face-to-face trading, there is no such complexity as in the case of trading in the public stock market. The issuer should be held liable for damages vis-à-vis the seller as to the loss caused by non-dis-

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<sup>49</sup> SEL art. 200, Item 6. The penalty is much less severe. See *supra* note 42.

<sup>50</sup> SEL art. 207, para. 1, Item 3 (1994). It is not entirely doubtless that this provision is applicable to the issuer because the issuer itself is not among the addressees of the provision which prohibits insider trading. See *supra* note 37.

<sup>51</sup> *Supra* note 2.

<sup>52</sup> MINPŌ [Civil Code], Law No. 89 of 1896, art. 709. The construction described in the text was the way academicians argued for imposing civil liability on a performer of an insider trading prior to the 1988 amendment to the Securities and Exchange Law. The Securities Council, however, turned down this view. See *supra* note 13. Now that there exist detailed statutory provisions of penal nature, most commentators seem to neglect the significance of civil liability. The writer once expressed his view as to how to formulate provisions on civil liability. Misao Tatsuta, *Naibusha torihiki no kouka ni kansuru ripporonteki kousatsu* [Consideration *de lege ferenda* of effects of an insider trading], in KIGYOHO NO KENKYU [Studies on Business Law] (collection of essays dedicated to Professor Ohsumi) 706 (1977); Misao Tatsuta, *Naibusha torihiki ni kansuru horitsu shian to teian shushi* [A Private Tentative Draft of Insider Trading Law and Comments thereto], 746 SHOH HOMU 2 (1977).

closure of a material fact. It is inappropriate to ignore the remedy of this sort under the pretext of complexity which pertains only to trading in the open markets.

## V. CONCLUSION

Japanese business circles at last attained their long-cherished demand by the 1994 amendments. But the ban was lifted only in part. The allowed repurchases are subject to several restraints, such as: the ceilings as to total amount of purchase price and total number of shares to be purchased in relation to the aggregate number of outstanding shares; the procedural requirements of approval by the general meeting of shareholders; and directors' liabilities ensuing from resultant shortage of disposable surplus. Above all, the 1994 amendments did not accede to the request from some groups to legitimize free repurchases, nor did they accept the proposal to insert a discretionary ground for repurchase of a German type to the effect that an issuer may acquire its own shares when necessary to cope with an emergency. In these respects, the 1994 amendments, as a big change in Japanese corporation law as they are, do not satisfy business circles, and they will request further deregulation.

An opportunity has been newly opened for an issuer to purchase a substantial amount of its own shares. The statutes on insider trading, as grand a maze as they look, have an important impact on Japanese corporate transactions. How and to what extent the 1994 amendments can cope with the evil of insider trading by an issuer, the most likely performer of insider trading, is to be seen in the future.



